Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

DEBORAH M. BORODATY and DORENE HAZELBAKER
Petitioners,

v.

WEST PENN POWER COMPANY, INC.,
a Pennsylvania Corporation
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. **Whether the Court of Appeals through the procedural device of accepting as a matter of law the defendant corporations' explanation of male company personnel working without notice over top a women's shower room with a full view below effectively destroys the enforceability of Title VII's prohibitions against a sexually offensive and hostile work environment contrary to the expressed policy of this Court?**

II. **Whether the Court of Appeals erred in finding waiver of the issue of inadequate response, when the company failed to conduct any investigations in response to the 1994 allegations of unauthorized viewing and the matter was expressly reviewed with the Court in responding to the Rule 50 Motion at trial?**

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The opinion of the United States Court of Appeals was not reported and appears at Appendix p3A. The trial court's discussion of the United States District Court for the Western District of Pennsylvania Rule 50 grant is not reported and appears at Appendix p39A.

STATEMENT OF JURISDICTION

Petitioners seek this Court's review of the judgment of the United States Court of Appeals for the Third Circuit entered November 1, 1999. Rehearing was requested but was denied on November 26, 1999. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioners filed suit against Petitioner under the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et seq., which provides:

§ 2000e-2. **Unlawful employment practices**

(a) **Employer practices.** It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive

or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Plaintiffs, Deborah M. Borodaty and Dorene Hazelbaker, filed this action against their employer, Defendant West Penn Power Company, Inc., (whose parent company is Power Systems) alleging that they have been subjected to a gender-based hostile work environment in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. Following the Answer by Defendant and discovery proceedings, Defendant filed a Motion for Summary Judgment which was denied by the Honorable Alan N. Bloch, United States District Court for the Western District of Pennsylvania.

A jury trial was held in this matter starting November 30, 1998. After presentation of the Plaintiffs, case, Defendant filed a Rule 50 motion which was granted by the Court as to the Plaintiffs' allegations of unauthorized viewing. Since these allegations constituted the gravamen of the Plaintiffs' complaints against Defendant, Plaintiffs withdrew their remaining claims against Defendant.

The Plaintiffs are two female employees who work as a part of the general labor force for the Defendants at their Mitchell Power Station facility. The Defendant provides restroom and shower facilities for male and female members of the labor force. These facilities are separate with separate facilities designated for use solely by the female employees.

On or about October 27, 1994, it was discovered that persons had gained access to the ceiling area above the women's showers and restroom. This was based upon a finding of dirt on the toilets that could only have come from the ceiling above. 98a-101a; 224a-227a.[1] Company explanations that a blower was

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[1] Page numbers followed by lower case letters designate pages of the Appendices filed in the Court of Appeals for the Third Circuit.

responsible was disproved by the location of the duct compared to other locations. 225a-227a. Management had explained the dirt found over and around the commode in the women's rest room as having resulted from turning on a blower following a shutdown for repairs. The plaintiffs, however, had noted that no dirt had appeared around an adjacent vent. During the inspection when toilet paper was held up to the vent, the paper was sucked up against the vent, indicating the vent was probably part of an air return rather than a blower. 102a-103a. Management also showed the plaintiffs dry-wall that had been put in the ceiling area as part of an asbestos project, not a security measure. The dry-wall was easily removable and may have already been penetrated since installation. 100a. This was a recurrence of a similar event as described below. The company had failed to undertake adequate precautions to protect against recurrence.

Earlier in October of 1991, female management personnel had mentioned to the Plaintiffs a suspicion that another employee and/or employees may be observing the women during the course of showers and/or other restroom activities. 292a-293a. Based upon this information, Plaintiffs undertook an investigation of the facility and determined that there existed access to the ceiling overlooking the women's showers and rest rooms. 293a-294a.

A visual inspection revealed that insulation material had been pulled back from the areas of the ceiling overlooking the shower area and restroom stalls. Empty beverage cans and cigarette butts were also found. 206a-211a; 295a-301a; 619a. Boot prints were also noted. 301a, 385a.

Immediate complaints were made to Union representatives and management personnel. But the Union indicated that it would not handle the matter nor process the grievance because it anticipated the necessity to defend employees who might become charged with misconduct. 91a-92a; 212a-213a. Following this, management initiated an investigation. However, investigating personnel appeared to engage in obstructive tactics, such as

misstating the statements of the complaining employees. 86a-91a; 313a-319a. The investigator also observed, but did not secure physical evidence such as soda cans. 619a. The investigator also knew that Ed Rodebaugh, an employee who had previously exposed himself to at least two women at the plant had been in the ceiling access area, had looked through the pulled back insulation, realized that he was over the ladies' shower room, and failed to report this to management. 616a. The investigator did not tell this to the complainants. 619a.

No effective remedial action was taken. The specific entranceway found was tackwelded and a painting contractor who was brought in to paint the ceiling did a very poor job. 93a. The women themselves were forced to paint over the visual peeping access holes through the ceiling tile. 95a. Additionally, the women discovered additional access ways to the ceiling area. 95a, 96a.

Subsequently, a West Penn Power, Inc. employee was arrested for extortion, apparently threatening to expose a fellow employee as an alleged sexual pervert and/or peeper. Charges were dropped against the employee when another individual plead guilty. The company cooperated with the alleged pervert/peeper, providing a company vehicle to transport him to various court proceedings to prosecute an alleged extortionist. 48a-51a. No action was taken against the alleged pervert/peeper. As a result of a motion in limine which was granted, the trial court did not admit this evidence in the trial. 51a.

Following disclosure of the evidence that the women had been subject to unauthorized viewing while nude in the shower, the Plaintiffs became the subject of numerous jokes, substantial teasing and otherwise subject to humiliating comments by male employees. Said jokes, teasing and humiliating comments continue to the present. 109a-110a; 230a-232a. The women suffered depression, anxiety, had problems at home, and modified their work habits to avoid the restroom. 223a; 233a; 453a-463a.

Other observations/peeping incidents occurred at other West Penn Power, Inc. facilities prior to discovery of these events at the Mitchell Power Station, located at Route 837 in Monongahela, Washington County, Pennsylvania. 111a-112a; 131a-132a.

The alleged "peeper" (Rodebaugh) had exposed himself (exhibition of sexual organs and/or touching of personal private parts in view) to at least two of the women at the plant, including Plaintiff Borodaty. 78a-85a; 426a; 428a-429a. This offensive conduct, including the peering here at issue, would normally not be considered a part of the proper employer/employee relationship, is an offensive and undesirable personal trait, and should not be tolerated by management.

Defendant knew or should have known that the premises should have been provided with adequate security in order to protect the privacy and other rights of the female employees in their shower and/or restroom area. This is particularly true since Defendant had notice of the prior activity from 1991, yet permitted the activity to recur in 1995.

Despite being fully aware of the danger of privacy invasion and/or other offensive acts against the female employees, Defendant failed to make reasonable, adequate and necessary provisions for their security including, but not limited to:

A. Controlling access to the ceiling areas by locking and/or otherwise securing grates, tiles and/or other access routes.

B. Partitioning the women's shower/restroom area in the ceiling to insure those with access to the ceiling would not overlook the women's shower areas.

C. The Respondent's breach of duty to provide their employees with adequate building security enhanced the likelihood that offensive activity would recur.

D. Specifically assigning or permitting an individual with tendencies to anti-social conduct with females (e.g., exposure), to be in an area with access to the women's locker room, contrary to regulations and policy which limited access to ceiling areas.

Although the Defendant has established a security unit for the purpose of protecting West Penn Power, Inc. employees and/or property, these security services were provided in a fashion to the detriment of the Plaintiffs as follows:

A. Failed to adequately control and/or discover and/or lock or secure access ways to the ceiling area over the women's shower/restroom area.

B. Failed to conduct a proper investigation.

C. Withheld certain facts from the plaintiffs concerning the identity and opportunity and access to the locker area by the "peeper." 619a.

Additionally, the Defendant failed to adequately follow-up complaints and/or allegations to remove such personnel who constitute a danger to their co-workers allowing continued employment. It is noted that as a part of this failure, the peeper/pervert, who has repeatedly exposed himself to female employees remains in the general labor force. At all times, the company has continued to protect this male employee and hence it is obvious that the matter is of a continuing nature. Discovery information has revealed that the individual, Ed Rodebaugh, had exposed himself to employees as outlined and was assigned by supervisors to the ceiling area shortly before the time of initial discovery. 614a-616a.

Pictures of the premises made in March 1998 were submitted to the jury which showed:

a. The air duct from which the dirt appears to have come was noted to have an area of a vent pried out at the duct joint, from which you could see into the toilet area of the ladies' restroom. 410a-411a.

b. The duct area was located near a wall which could support weight. This wall intersects with the men's rest room at a pillar. 410a.

c. On the men's restroom side, there was an indication of two or three handprints on the tile near the pillar. A footprintlike marking was on the drywall on the ceiling above the tiles, over top of the pillar area. 402a

d. The ceiling review also revealed the appearance that another drywall panel near the corner of the partitioned area, outside the former women's lunchroom, had repairs to screw holes with putty and paint over. Other apparent boot prints were noted upon removal of the outside ceiling tile. 405a

e. The bootprints noted over the pillar area and under the outside ceiling tile appeared similar.

These circumstances confirmed that the problem was on-going.

However, following presentation of plaintiffs' case, the district court granted defendant's Rule 50 motion, finding that there was insufficient evidence of peering and/or inadequate response to the complaint of unauthorized viewing.

The Third Circuit, in an unpublished memorandum by Circuit Judge Mansmann found that the lower court correctly accepted the explanations of corporate management, for legitimate

reasons for employers to be over the shower area, as a matter of law. Judge Mansmann's reading of the record further suggested that the issue of inadequate viewing had been waived, despite it being part and parcel of the argument against the Rule 50 motion.

REASONS FOR GRANTING THE WRIT

A. This Court should grant certiorari because paramount federal policy against sexual harassment will otherwise be undermined by an unsympathetic regional judiciary willing to accept company explanations of male worker presence over a blue collar ladies' restroom and shower facility, as a matter of law.

The issues and problems presented by this appeal demonstrate the most effective devices available to the lower federal courts to completely defeat important and expressed federal policies with which they are not in agreement. This case raised issues of the first rank concerning the protection of the dignity of a small contingent of women painfully attempting to break into the harsh reality of blue collar work in western Pennsylvania. Their fundamental right to freedom from a pattern of sexual harassment, male access to viewing areas above the ladies' shower and commode regions obviously creating a hostile work environment and providing a perverse form of male entertainment has received not the slightest sympathetic judicial ear. Instead, through the use of a procedural device, the Rule 50 motion, based astonishingly upon the acceptance of the company's explanation for the presence of the male employees as a matter of law, the Pittsburgh federal judiciary renders unenforceable controlling federal policies.

The difficulty of this approach, coupled with the near inability to obtain review by the U.S. Supreme Court on Rule 50 questions, is that federal policy is destroyed almost effortlessly and silently. There need be no debate over the nuances of supervisory liability under Title VII. There need be no anquish on the balance between a woman's right to dignity and a supervisor's productive career. All is quietly swept away under the rubric of insufficient evidence. After all, pursuant to Rule 10 of the Rules of the Supreme Court:

A petition for a writ of certiorari is rarely granted where the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

This sensible rule protects the Court from a function it normally cannot be expected to perform. After all, the facts can be fairly reviewed by the trial judge and Court of Appeals. Precious judicial time at the highest level can be preserved for the good faith resolution of legal conflicts which manifest themselves among the intermediate Courts. The Supreme Court's reserve in granting certiorari is well known in the profession, even understood at the far reaches of the business - those attorneys working above store fronts seeking to aid individuals in their struggle against corporate power supported by a philosophically unsympathetic regional judiciary.

However, there must be an occasional exception to the well-honored rule or else society will suffer, case-by-case, fact by unrecognized fact, the practical elimination of otherwise revered ideals of justice and equality. An examination of this record demonstrates plainly the danger. Substantial circumstantial evidence of the "peering" has been ignored, not permitted even to be reviewed by a jury. The soul-hardening message has been loudly delivered to the blue collar female contingent at the Mitchell Power Station on the banks of the Monongahela River. They are to be barely tolerated. They are not to make trouble asserting basic rights of human dignity. There is no forum that will afford their complaint even the slightest respect. What lesson should they pass on to their daughters about economic or judicial fairness?

It is submitted, that on occasion, this Court should exercise its supervisory powers, to wake up the lower courts and to demonstrate that rulings which effectively though quietly destroy federal policy and the justice they reflect in the hearts of the citizens seeking to invoke the law's protection, will not be tolerated.

The defendant argues that these facts are insufficient to establish a case for a hostile work environment under Title VII pursuant to factors suggested in Harris v. Forklift Systems, Inc., 114 S.Ct. 367 (1993). The District Court had reviewed essentially the same facts before the trial and had denied the defendants' motion for summary judgment. However, at the conclusion of the plaintiffs' case, the court reversed its position. At that time, the district court granted defendants' Rule 50 motion, finding insufficient evidence to establish peering or a hostile work environment based upon the absence of secure restroom facilities for the women. App. 634a. Under Harris, the court is to examine "all the circumstances" which may include: 1) frequency of discriminatory conduct, 2) severity, 3) whether it is physically threatening or humiliating, or a mere offensive utterance, and 4) whether it unreasonably interferes with an employee's work performance. As noted in the statement of facts above, an evaluation of these factors heavily favors the plaintiffs here.

A review of all the circumstances here demonstrates that the frequency of the discriminatory conduct alleged here is ongoing. Accordingly, the court reviewed both the 1991 incident and the 1994 incident. It was contended that the identity of at least one of the peeper/perverts has now been reasonably established, yet he continues to remain in the work force. His identity was deduced based upon his earlier repeated sexual exposures to other women and his admission that he had been in the ceiling peering into the restroom through the insulation holes to the investigator. However, he sought to justify it as part of a work detail, an explanation the jury could reject. It should have come as no surprise at all to the defendant that in the absence of any form of discipline or even counselling, that evidence would eventually again surface that there would be a repeat of the peering above the ladies' shower and toilet stalls. Additionally, the hostile atmosphere continues to be perpetrated in a more general way with the continuing existence of pornographic magazines and pictures at the plant, discrimination in promotions and work assignments, the continuing teasing by male employees and references about the peeping incidents, the "old

boy" attitude and resentment of women "doing men's jobs" that was pervasive at the company, and the failure to take the complaints of the women employees seriously. 485a-489a; 501a-504a; 109a-110a; 230a-232a.

The lower court was willing to proceed regarding the complaints of pornographic magazines and comments. However, the effect of the Rule 50 ruling was to gut the case of plaintiffs' allegations. At that point, plaintiffs concluded it was futile to continue, withdrew the remaining allegations, and sought the instant appeal.

It is equally obvious that the peeping/peering and other matters constitute a gross invasion of privacy far exceeding the bounds of what reasonably should be tolerated and therefore can only be considered as severe. It is also clear that the conduct is extremely humiliating as each of the women testified. 107a-108a; 112a; 223a-224a; 233a-236a.

Finally, it unreasonably interfered with the employees' work performances in that it was distracting, broke the trust and sense of security the women employees had had and were entitled to expect from the company.

Similar facts were found to rise to a Title VII violation in Liberti v. Walt Disney World, 912 F.Supp. 1494 (M.D.Fla.1995). That case recognized that an employee's conduct of videotaping other employees in the dress room and rest room areas rose to the level of a hostile environment claim. It is noted that in Liberti, the court emphasized the failure of the company to take reasonable action in response to the complaints. In the instant case, a genuine jury issue existed with regard to the company's response. The women themselves were forced to paint over the holes in the ceiling tile. 95a. Eventually, the company did place dry wall around the lady's room ceiling area, although this occurred as a part of a general asbestos removal plan. However, the dry wall was easily removable and the ceiling itself remained readily accessible.

100a. Investigation has revealed that visual peering could again be achieved through a gap in the splicing of the duct work above the toilet stalls. 410a-411a. Most importantly, the most likely offender, Rodebaugh, of whom the company knew there were numerous complaints of antisocial conduct, had received no discipline or even suggestion of counselling.

Further, it would be clear from the facts of this case that there exists a "continuing violation." The Third Circuit has recognized the validity of this theory as it applies to a hostile work environment claim in West v. Philadelphia Elect. Co., 45 F.3d 744 (3d Cir. 1995). West suggested that inquiry into the existence of a continuing violation under Title VII considers: subject matter - whether violations constitute the same type of discrimination; frequency; and permanence - whether nature of violations should trigger the employee's awareness of the need to assert her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate. Id. at 755, n. 9. Thus, the Third Circuit recognized that continuing violation exists when there was consistent harassment together with selected major incidents. Similarly, in this case there has been regular and pervasive discrimination as demonstrated by the continuing existence of pornographic magazines and pictures at the plant, discrimination in promotions and work assignments, the continuing teasing by male employees and references about the peeping incidents, the "old boy" attitude and resentment of women "doing men's jobs" that was pervasive at the company, and the failure to take the complaints of the women employees seriously. This general ongoing discrimination has been punctuated by the discovery of the major events of unauthorized peering. Further, Rodebaugh was continually left free to indulge his proclivities without fear of discipline or counselling. However, the lower court's Rule 50 ruling eliminated the major components of the claim from the jury's consideration.

Additionally, it should be noted that the Third Circuit has recognized the importance of earlier harassment in a sexual

discrimination hostile environment case in Rush v. Scott Specialty Gases, Inc., 113 F.3d 476 (3d Cir. 1997). In Rush, the court recognized the applicability of the continuing violation theory to where there was a continuing pattern of derogatory remarks and rude behavior. Similarly, West, supra, remanded the matter for a new trial on the basis of the wrongful exclusion of evidence of prior incidents. However, the court here in the instant case found as a matter of law that there was no peering in 1991 or 1994, completely undercutting the cause of action.

B. This Court should grant certiorari in order to establish at the highest level a national precedent requiring employers to conduct an investigation and adequate response to complaints of a hostile environment regardless of whether the complaint is subjectively viewed as founded by the management.

Alternatively, it should be noted that even if the lower court was correct in determining that, as a matter of law, no peering was demonstrated, nonetheless a cause of action existed for a hostile work environment on the basis of the company's inadequate response to the allegations, leaving the ladies with a sense of insecurity concerning the restroom facilities.

When the dirt on the commode seats was again discovered in 1994, no investigation was conducted. The ceiling tile was popped and the ladies were simply told that no-one could get to the area due to the existence of the drywall.

As the Third Circuit noted in Knabe v. Boury Corp., 114 F.3d 407, 414 (3d Cir. 1997), some investigation must be conducted:

> An investigation must be undertaken, see Swentek v. USAir, 830 F.2d 552, 558 (4th Cir. 1987)("In taking remedial action, USAir was obliged to investigate Swentek's charges and to present a reasonable basis for its

subsequent actions."), and an employer can be held liable if a faulty investigation renders its subsequent remedial action inadequate, i.e., not reasonably calculated to prevent further harassment.

Here, in response to the 1994 complaint, the company took virtually no action. Nothing remedial was done. This clearly was not reasonably calculated to prevent further harassment. The company's position, apparently endorsed by the district court in the grant of the Rule 50 motion, was that the ladies' fears and anxieties are the product of an overactive imagination, hence justifying a continued ignoring of their concerns.

Clearly, even if this was the only evidence, some action would have been required by the company, since this was similar to the 1991 evidence which led to the discovery of the rolled back insulation. However, when a further investigation was conducted during the Human Relations Commission inspection, and later confirmed by pictures taken in 1998, numerous other circumstances came to light strongly suggesting the opportunity for further peering. Footprints appeared on the drywall. 402a; 405a; 410a. The drywall was damaged in the fastening areas. 100a. The prints were located near weight-bearing walls leading to the areas above the commodes. 410a. The area above the commodes where the dust was discovered had been subjected to tampering: specifically, the duct joint had been pried open, again allowing for a view of the ladies restroom. 410a-411a. Astonishingly, even after this information was discovered, the company refused to acknowledge the possibility of a problem, took no remedial action, and continued to attack the foundation of the women's concerns.

The absolute intransigence of the company to the concerns of the women is exactly the harm sought to be addressed by federal sexual harassment law. Management personnel responsible for females in the blue collar force at the Mitchell Power Station along the Monongahela River have not conducted themselves as models of sensitivity to these concerns.

The history of the continuing violations shows the following course of conduct. The women initially discovered rolled back insulation over the shower area providing clear views of the are as well as over the toilet area and the changing area by the lockers. Soda cans and cigarette butts were found in the ceiling are near where the insulation had been pulled up. 293a-294a; 206a-211a; 295a-301a; 619a. The lower court refused to even acknowledge that this would be a legitimate concern. 629a-634a. An investigator was called in. He failed to secure the soda cans, although he observed them in the ceiling. 619a. He discovered from talking with several ladies that Ed Rodebaugh had previously been in the area of the ladies' showers, had peered down into the shower area and had not reported this breach of security. He chose not to tell the ladies this information. Instead, he asked some of them to sign statements about the exposures which contained misinformation. When the ladies declined to sign these statements, he went no further, although he claimed the investigation into the peering remained open. His final recommendations to management were whited out from his report and not disclosed to the plaintiffs. This goes beyond even a flawed investigation but is itself part of the problem resulting in an inadequate response. Yamaguchi v. U.S. Dept. of the Air Force, 109 F.3d 1475 (9th Cir. 1997); Mockler v. Multomah County, 140 F.3d 808 (9th Cir. 1998). The union would not take a grievance. 91a-92a; 212a-213a. An initial effort to paint over the holes in the ceiling tiles failed. 93a. The women themselves, upon complaint, were forced to do the job themselves. 95a. No disciplinary or counseling action was taken as to Rodebaugh, which was obviously needed to protect the women. Such failures can amount to an inadequate response on proper facts. Bonenberger v. Plymouth Township, 132 F.3d 20 (3d Cir. 1997); Yamaguchi, supra.

In contrast, a later extortion attempt against Rodebaugh was met with full cooperation by the company to protect Rodebaugh, including a referral to the state police and the use of oral

interception devices. The lower court ruled this information not relevant, granting a limine motion. 48a-51a.

Years later drywall was placed around the restrooms. When dirt again appeared at the commodes, virtually nothing was done.

The purpose of claims of a sexually hostile working environment is to level the playing field for women who work by preventing others from impairing their ability to compete on an equal basis with men. Title VII embodies a series of criteria that seeks to halt extremely insensitive conduct against women, conduct so egregious as to alter conditions of employment and destroy their equal opportunities in the work place. DeAngelis v. El Paso Municipal Police Officers Assn., 51 F.3d 591 (5th Cir. 1995).

The callous disregard of the rights of these women, relating to the most fundamental concern of restrooms and showing security has had the harmful effects that Title VII was designed to protect against. They have been labeled "trouble-makers." They have experienced depression, anxieties and other psychological harms. 453a-463a. It has interfered with their home life. 233a. They seek to avoid use of the facilities, if it is at all possible. 223a. There have been no promotions. While none would claim that it would be easy to assimilate a small number of women into the gruff and difficult blue collar work environment of a power plant, nonetheless, under federal law, the company owes these employees the minimum of a level playing field. The goal is not remotely met under these circumstances where their complaints of basic security are not taken seriously. The absence of a reasonable investigation and the absence of any remedial efforts clearly violate the statutes.

Finally, this Court can give strong national guidance on the need to atleast conduct an investigation in response to complaints. To date, this would appear to be an important issue of first impression at this level. Guidance for the lower courts can be provided on the minimum requirements an employer is obliged to

undertake. Such reasonable guidance would serve to protect both sides of these delicate issues.

Some circuits already make it clear that in Title VII claims against an employer grounded in allegations of co-worker harassment, the act of discrimination is not the harassment, but rather the employer's inadequate response to the charge of harassment. eg. Blankenship v. Parke Care Centers, Inc., 123 F.3d 868 (6th Cir., 1997). However, the Court in Blankenship was willing to impose liability on the employer only if the response exhibited such indifference as to indicate an attitude of permissiveness that amounted to discrimination. In that case, the employer's response was adequate as a matter of law.

Other circuits have adopted other language for the test, in an apparent effort to follow this Court's lead in Burlington Industries v. Ellerta, 542 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). That case suggested that an employer is negligent if he knew or should have known about the conduct and failed to stop it. It further held that an employer is vacariously liable for a supervisor's creation of a hostile work environment, subject to the affirmative defense "that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior. Burlington, 118 S.Ct. at 2270.

The Tenth Circuit specifically cited the foregoing language from Burlington, in adopting their standard. Baty v. Willamette Industries, Inc., 172 F.3d 1232 (10th Cir., 1999).

The Eighth Circuit has specifically held that employers cannot do nothing in response to a complaint, simply because the accused employer denies the conduct and there is no corroboration. Hathaway v. Runyon, 132 F.2d 1214 (8th Cir., 1997).

The Fourth Circuit, in Harris v. L. & L. Wings, Inc., 132 F.3d 978 (4th Cir., 1997) made an effort to articulate a sensitivity

to the legitimate needs of the employer, even while affirming an award of punitive damages for the wanton disregard of the employer's rights:

> Wings suggests, however, that the complex legal requirements in this whole area left it at sea. We are mindful of the difficulty employers face when dealing with claims of harassment, finding themselves between the rock of an inadequate response under Title VII and the hard place of potential tort liability for wrongful discharge of the alleged harasser. The legal standard of "prompt and adequate remedial action" in no way requires an employer to dispense with fair procedures for those accused or to discharge every alleged harasser. Knabe v. Boury Corp., 114 F.3d 407, 414 (3d Cir.1997). ("[A]n employer, in order to avoid liability for the discriminatory conduct of an employee, does not have to necessarily discipline or terminate the offending employee as long as the employer takes corrective action reasonably likely to prevent the offending conduct from reoccurring."). And a good faith investigation of alleged harassment may satisfy the "prompt and adequate" response standard, even if the investigation turns up no evidence of harassment. Kilgore v. Thompson & Brock Management, Inc., 93 F.3d 752, 754 (11th Cir.1996). Such an employer may avoid liability even if a jury later concludes that in fact harassment occurred. See Fitzgerald, 68 F.3d at 1264. But Wings did absolutely nothing to address the harassment of which Harris and Prasky complained. And this total absence of a response, not to mention a "prompt and adequate" one, is cognizable evidence of Wings' indifference to the federally protected rights of those in its employ. (Emphasis added). 132 F.3d at 984.

Clearly, sufficient facts had been put forth before the court to survive the Rule 50 motion concerning the core allegations of the hostile environment. The matter should not have been taken

from the jury as a matter of law. The line between a merely unpleasant working environment on one hand and a hostile or deeply repugnant one on the other, is not a bright line. When it is uncertain on which side the defendant's conduct lies, the matter rests with the jury. The jury, made up of a cross-section of our heterogeneous communities provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment under Title VII. Gallagher v. Delaney, 139 F.3d 338 (2d Cir. 1998).

In this case, the lower court committed error, effectively gutting the case, in granting a Rule 50 motion concerning the women's allegations of peering and the company's response thereto. This ruling should be reversed for two reasons. First, there were sufficient facts to allow the jury to infer the existence of peering. It could not be said that peering did not exist as a matter of law. Second, whether peering in fact occurred or not would not be determinative of the hostile environment claim concerning the allegation of peering. The company still had a duty to investigate and take appropriate remedial action to assure an appropriate measure of security to the facilities. These matters belonged to the sound purview of the jury. The Rule 50 motion should not have been granted unless the evidence and justifiable inferences most favorable to the employees would not have afforded any rational basis for a verdict in their favor. Robinson v. City of Pittsburgh, 120 F.3d 1286 (3d Cir. 1997).

Defendant West Penn Power also maintains that the plaintiffs have waived the issue of whether or not its response to the claims of unauthorized peering constituted in itself the creation of a hostile environment, whether or not such peering actually occurred, by withdrawing its remaining claims after the Rule 50 motion. However, a review of the record makes it clear that this contention was part and parcel of the argument concerning unauthorized viewing, and that the court felt that if there was no evidence of peering, as he had found as a matter of law, that there would be no need for the company to respond to the claim.

Counsel brought this to the Court's attention on the record at RR. pp. 637a-639a:

> MR. SUWAK: .... First, Judge, just so I have articulated fairly, we would indicate that the issue is not a factual issue of, do we prove that there was actual peering? We believe that rather the situation, in terms of creating a hostile environment, is more along these lines:
>
> One. Were there circumstances that would subjectively raise the concern in the minds of the plaintiffs?
>
> Two. If there were, then what was the nature of the company's response? This is not a criminal case where are attempting to allocate responsibility onto a particular person. But, under circumstances were there were sufficient issues to raise the alarm, the inability of the company to respond and secure the environment of the ladies' restroom itself would create a hostile sexual environment.
>
> So, we would respectfully request the Court consider the effort not in the concrete terms like would be done in a criminal case, but rather in the broader view associated with a hostile environment.
>
> THE COURT: So, you are saying even if the peeking didn't occur, if the -- if the company doesn't respond to the non-peeking, because the plaintiffs perceive that peeking took place even though they have no proof that it did, that that can amount to a hostile work environment?
>
> MR. SUWAK: If you don't respond to the insulation being pulled back over top the ladies' locker room.

THE COURT: We have to assume that the peeking didn't occur, because I have found that you didn't put that --

MR. SUWAK: I understand that, and I am not sure that it argues that the peeking occurred. What I am saying is, that if you have a work environment -- if I'm called to work in this courthouse and the insulation is removed from my ceiling so that there is holes, and we understand that regular work duties will put male workers over top of me, then I respectfully submit that that evidence demonstrates that there must be some response by the company to correct that. Otherwise, if peeping occurred or not, if you put a window in front of my restroom and bring members of the opposite sex and give them the opportunity to view me, that opportunity would create a sufficient hostility.

THE COURT: Do you have any law to support that position?

Opposing counsel made it clear that the question of inadequate investigation would not be reached if there was no preliminary finding of peering. The court was inclined to agree unless he was presented with clear contrary case law:

MRS. SMITH-DELACH: Your Honor, if I may respond? One of the elements -- the first element that has to be shown is that the employee suffered an intentional discrimination because of his or her sex. And not only that, but then the question becomes whether or not the respondeat superior liability exists, and that gets into the question of whether or not there was adequate investigation and reasonable measures taken. Our whole -- the point is that there was no reasonable -- He didn't have any proof that peering occurred.

THE COURT: I understand that, and I agree with you factually he is saying that's not necessary.

MRS. SMITH-DELACH: I think it has to be.

THE COURT: I know. But, I am going to look at his cases. My inclination is to agree with you, but I want to give him the opportunity to look at the cases he says supports his position. RR. 641a -642a.

The court then distinguished each case brought to its attention and refused to accept plaintiff's theory. The court then made it clear that the causes of action related to the peeking incidents were dismissed and that other specific claims regarding pornographic calendars or photographs and/or jokes would be withdrawn. See RR. 648a-649a, especially the distinction among the claims at 648a line 25 and 649a, lines 1-3.

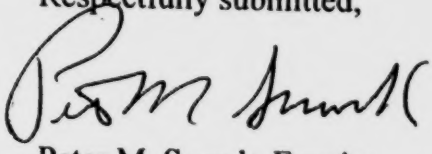
From the above record it is apparent that the plaintiffs would have proceeded with a hostile work environment claim if the court would have recognized the theory that a hostile environment would be created on the basis of failure to take the claim of unauthorized peering seriously whether or not a particular individual could be identified.

This Court is urged to bring clarity and power behind this important federal policy. This case reflects the ease by which an unsympathetic judiciary can undercut these important policy concerns.

CONCLUSION

Petitioners respectfully request that this Court grant the Petition.

Respectfully submitted,



Peter M. Suwak, Esquire

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3010

DEBORAH M. BORODATY; DORENE HAZELBAKER,

vs.

WEST PENN POWER COMPANY, INC., a Pennsylvania Corporation,

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge,
SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, MCKEE, RENDELL BARRY, and WEIS,* Circuit Judges.

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority

of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Carol Los Mansmann

---

*Senior Circuit Judge Weis voted only as to panel rehearing.

Nov 26 1999

. UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3010

DEBORAH M. BORODATY;
DORENE HAZELBAKER,
Appellants

v.

WEST PENN POWER COMPANY, INC., a
Pennsylvania corporation

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civ. No. 97-cv-00163)
District Judge: Honorable Alan N. Bloch

Submitted Under Third Circuit LAR 34. 1 (a)
October 28, 1999
Before: MANSMANN, ROTH and WEIS, Circuit
Judges.

(Filed November 1, 1999)

MEMORANDUM OPINION OF THE COURT

MANSMANN, Circuit Judge.

Deborah Borodaty and Dorene Hazelbaker, plaintiffs in an action alleging that West Penn Power Company maintained a hostile work environment in violation of Title VII of the Civil Rights Act of 1964, appeal from an order of the District Court granting West Penn's motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50, on a portion of the Title VII claim. Specifically, the plaintiffs challenge the District Court's conclusion that there was insufficient evidence to submit to the jury claims that West Penn employees contributed to a hostile work environment by peering into women's restroom and locker facilities.[1] We have reviewed the record in his matter

[1]The District Court's grant of the Rule 50 motion with respect to "peering" did not include the other elements of the plaintiffs hostile work environment claim - inadequate investigation of the alleged peering; jokes, teasing, and humiliating comments by male employees; gender-based discrimination in work assignments; offensive photographs and calendars; and failure to take seriously female employees' complaints. Following the District Court's ruling that there

and the law governing the elements of a successful hostile work environment claim, and are convinced that the grant of West Penn's motion for judgment as a matter of law was appropriate. We will, therefore, affirm the order of the District Court.

I.

The parties are well familiar with the factual and procedural history of this matter. We refer to that history, therefore, only to provide context for our conclusions of law.

In Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990), we set forth five elements of a successful hostile work environment claim against an employer. A plaintiff is required to show that: (1) the employee suffered intentional gender discrimination; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff-,

---

was insufficient evidence to support the peering portion of the case, the plaintiffs themselves withdrew all other claims relating to alleged sexual harassment. Counsel for the plaintiffs stated: "In view of the Court's ruling on the Rule 50 motion we would choose not to proceed to the jury on those remaining facts." (647a).

(4) the discrimination would detrimentally affect a person of the same sex in that position; and)5) respondeat superior liability existed. Out focus in this matter is on the first element, and the District Court's conclusion that: "[T]here [was] insufficient evidence from which a reasonable jury could find that peeking took place at all...." (634a). "[T]here isn't sufficient evidence to prove that thepeeking occurred." (644a).

A Rule 50 motion should be granted only if, viewing the evidence in the light most favorable to the non-moving party and according that party the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury could reasonably find liability. Coleman v. Kaye, 87 F.3d 1491, 1496 (3d Cir. 1996), cert. denied, 519 U.S. 1084 (1997).

At the close of the evidence, the District Court concluded that the plaintiffs had failed to present sufficient evidence that peeping took place. Although the undisputed evidence showed that West Penn employees occupied the area over the women's

facilities, the evidence also showed that their presence was legitimate, i.e., employees were in that area in order to repair duct work and effect asbestos removal. All of the evidence introduced by the plaintiffs with respect to the condition of and activities above the ceiling of the women's facilities was consistent with West Penn employees' legitimate presence. In this respect, the circumstances here differ from those present in the case upon which the plaintiffs place primary reliance, Liberti v. Walt Disney World Co., 912 F. Supp. 1494 (M.D. Fla. 1995).

In Liberti there was no reasonable explanation for holes drilled in the walls of the women's dressing room; the inference of improper peering there was not undercut by any allegation of legitimacy. Here, however, each of the items of evidence introduced by the plaintiffs is susceptible to benign interpretation. We agree with the District Court that submitting the issue of peering to the jury based on the evidence in this record would have invited speculation. As a result, we conclude that the District Court's grant of West Penn's

motion for judgment as a matter of law was appropriate.

II.

Because we have failed to find merit in the allegations of error made by the plaintiffs, we will affirm the order of the District Court.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Carol Los Mansmann
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3010

DEBORAH M. BORODATY;
DORENE HAZELBAKER,
Appellants

v.

WEST PENN POWER COMPANY, INC.,
a Pennsylvania corporation

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civ. No. 97-cv-00163)
District Judge: Honorable Alan N. Bloch

Before: MANSMANN, ROTH and WEIS, Circuit Judges.

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of Pennsylvania and was submitted under Third Circuit LAR 34. 1 (a) on October 28, 1999.

On consideration whereof, it-is now here ordered- and.adjudged by this court that the judgment of the District Court entered on December 8, 1998, be and the same is hereby affirmed.

Costs taxed against the appellants.

ATTEST:
/s/ P. Douglas Fisk
Clerk

Dated: November 1, 1999

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DEBORAH M. BORODATY and :
DORENE HAZELBAKER,

Plaintiffs, : No. 97-0163

v. :

WEST PENN POWER COMPANY, :
INC., a Pennsylvania
corporation,
Defendant.

CIVIL COMPLAINT

AND NOW, come the Plaintiffs, Deborah M. Borodaty and Dorene Hazelbaker, by and through their counsel, Peter M. Suwak, Esquire, and Dale M. Brown, Esquire, who file this Complaint based upon the following:

1. Plaintiff Deborah M. Borodaty is an adult individual who resides at 8 Mary Ellen Street, Monongahela, Washington County, Pennsylvania, 15603.

2. Plaintiff Dorene Hazelbaker is an adult individual who resides at RD#4, Box 212, Belle Vernon, Westmoreland County, Pennsylvania, 15012.

3. Defendant West Penn Power, Inc., is a public utility organized under the laws of the Commonwealth of Pennsylvania responsible for the generation and sale of electric power, is the employer of numerous individuals including the Plaintiffs, and is the owner of a certain facility here at issue, Mitchell Power Station, located at Route 837, with a mailing address of Box 282, Monongahela, Washington County, Pennsylvania, 15063. Defendant West Penn Power, Inc.'s main office is located at 800 Cabin Hill Drive, Greensburg, Pennsylvania, 15601, is a wholly owned subsidiary of Defendant Allegheny Power System, Inc., and is incorporated in Pennsylvania.

4. Federal Court jurisdiction is based upon 28 U.S.C. §§1337,1343, and 42 U.S.C. Section 2000e-S(f)(3)(P.L. 88-352 Title VII, §708 (b). This action is authorized and instituted pursuant to §706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964 (42 U.S.C 920OOe-5(f)(1) and (3)).

5. The Defendant is an "employer" within the meaning of Section 701(d) ofTitle VII in that it is a person engaged in industry affecting commerce and employs and

has employed at all relevant times, a requisite number of persons; and is a "person" within the meaning of Section 701(a) of Title VII.

6. The Plaintiffs are two female employees who work as a part of the general labor force for the Defendants at their Mitchell Power Station facility. The Defendant provides restroom and shower facilities for male and female members of the labor force. These facilities are separate with separate facilities designated for use soley by the female employees.

7. On or about October 27, 1994, it was discovered that persons had gained access to the ceiling area above the women's showers and restroom. This was based upon a finding of dirt on the toilets that could only have come from the ceiling above. Company explanations that a blower was responsible was disproved by the location of the duct compared to other locations. This is a recurrence of a similar event as described in later paragraphs below. The company has failed to undertake adequate precautions to protect against recurrence.

8. Earlier in October of 1991, female management personnel had mentioned to the Plaintiffs a suspicion that another employee and/or employees may be observing the women during the course of showers and/or other restroom activities.

9. Based upon this information, Plaintiffs undertook an investigation of the facility and determined that there existed access to the ceiling overlooking the women's showers and rest rooms.

10. A visual inspection revealed that insulation material had been pulled back from the areas of the ceiling overlooking the shower area and restroom stalls. Empty beverage cans and cigarette butts were also found.

11. Immediate complaints were made to Union representatives management personnel.

(a) The Union indicated that it would not handle the matter nor process the grievance because it anticipated the necessity to defend employees who might become charged with misconduct.

(b) Following delays, management initiated an investigation. However, investigating personnel appeared to engage in obstructive tactics, such as misstating the statements of the complaining employees.

(c) No effective remedial action was taken. The women themselves were forced to paint over the visual peeping access holes through the ceiling tile. Additionally, the women discovered additional access ways to the ceiling area.

(d) Subsequently, a West Penn Power, Inc. employee was arrested for extortion, apparently threatening to expose a fellow employee as an alleged sexual pervert and/or peeper. Charges were dropped against the employee when another individual plead guilty.

(e) The company cooperated with the alleged pervert/ peeper, providing a company vehicle to transport him to various court proceedings to prosecute an alleged extortionist. No action was taken against the alleged pervert/peeper.

12. Following disclosure of the evidence that the women had been subject to unauthorized viewing while nude in the shower the Plaintiffs became the subject of numerous jokes, substantial teasing and otherwise subject to humiliating comments by male employees. Said jokes, teasing and humiliating comments continue to the present.

13. Other observations/peeping incidents occurred at other West Penn Power, Inc. facilities prior to discovery of these events at the Mitchell Power Station, located at

Route 837 in Monongahela, Washington County, Pennsylvania.

14. Based upon the foregoing, the Plaintiffs have been subjected to a continual pattern of practice of discrimination and harassment based upon their sex as follows:

(a) Complaints against male employees are not taken seriously.

(b) Work assignments are not divided on a non-discriminatory basis.

(c) Lewd and humiliating remarks and comments by male employees are tolerated.

(d) Offensive photographs and calendars are permitted to be displayed in the work areas.

(e) A hostile work environment and/or atmosphere has been created.

15. The alleged "peeper" has exposed himself (exhibition of sexual organs and/or touching of personal private parts in view) to at least three (3) women at the plant, including Plaintiff Borodaty. This offensive conduct, including the peering here at issue, would normally not be considered a part of the proper employer/employee

relationship, is an offensive and undersireable personal trait, and should not be tolerated by management.

16. Defendant knew or should have known that the premises should have been provided with adequate security in order to protect the privacy and other rights of the female employees in their shower and/or restroom area. This is particularly true since Defendant had notice of the prior activity from 1991, yet permitted the activity to recur in 1995.

16. Despite being fully aware of the danger of privacy invasion and/or other offensive acts against the female

employees, Defendant failed to make reasonable, adequate and necessary provisions for their security including, but not limited to:

A. Controlling access to the ceiling areas by locking and/or otherwise securing grates, tiles and/or other access routes.

B. Partitioning the women's shower/restroom area in the ceiling to insure those with access to the ceiling would not overlook the women's shower areas.

C. The Respondent's breach of duty to provide their employees with adequate building security enhanced the likelihood that offensive activity would recur.

D. Specifically assigning or permitting an individual with tendencies to anti-social conduct with females (e.g., exposure), to be in an area with access to the women's locker room, contrary to regulations and policy which limited access to ceiling areas.

17. The Defendant has established a security unit for the purpose of protecting West Penn Power, Inc. employees and/or property.

18. These security services were provided in a fashion to the detriment of the Plaintiffs as follows:

A. Failed to adequately control and/or discover and/or lock or secure access ways to the ceiling area over the women's shower/restroom area.

B. Failed to conduct a proper investigation

C. Withheld certain facts from the plaintiffs concerning the identity and opportunity and access to the locker area by the "peeper."

19. Defendant has hired an employee/employees with perverse tendencies or a danger to the security of fellow employees, particularly women.

20. Defendant has been discriminatory in its hiring practices in that it conducts no preliminary screening in an

effort to identify these traits particularly offensive to women.

21. Additionally, the Defendant failed to adequately follow-up complaints and/or allegations to remove such personnel who constitute a danger to their co-workers allowing continued employment.

22. It is noted that as a part of this failure, the peeper/pervert, who has repeatedly exposed himself to female employees remains in the general labor force. At all times, the company has continued to protect this male employee and hence it is obvious that the matter is of a continuing nature. Discovery information has revealed that the individual, Ed Rodebaugh, had exposed himself to employees as outlined and was assigned by supervisors to the ceiling area at the time of initial discovery.

23. Timely complaints were made by the Plaintiffs to the Pennsylvania Human Relations Commission which processed the actions with the Equal Employment Opportunity Commission. On or about October 29, 1996, the Equal Employment Opportunity Commission issued

determinations permitting the Plaintiffs to file these private actions in federal court.

24. The unlawful employment practices and violations of the civil rights herein complained of occurred during the course of Plaintiffs' employment with Defendant and were carried out by the Defendant itself or its agents, servants and employees and were committed solely because of the Plaintiffs' sex.

25. The effect of the policies and practices pursued by the Defendants, as alleged above, has been to limit, segregate, classify and discriminate against the Plaintiffs in ways which

jeopardize their careers and tend to deprive them of employment opportunities by reason of their sex in violation of Title VII.

26. Plaintiffs have surffered, are now suffering, and will continue to suffer distress, damage to their reputation, and humiliation caused by the unlawful policies, practices, conduct, and usage of the Defendant, all to their great damage.

27. By reason of the Defendant's actions, the Plaintiff has found it necessary to retain the services of an attorney in the proceedings and heretofore, and is therefore entitled to attorney's fees pursuant to Sections 706 of Title VII and under the general equity powers of the Court.

28. As a result of the foregoing conduct, Plaintiffs have sustained damages including, but not limited to, the following:

(a) Compensatory damages in an amount to be determined by the Court for emotional suffering.

(b) Compensatory damages in an amount to be determined by the Court for embarrassment, humiliation and loss of enjoyment in life.

(c) Costs and such other relief as this Court shall deem proper.

(d) Punitive damages due to outrageous conduct.

(e) Attorney's fees.

Wherefore, Plaintiffs pray for judgment against the Defendant in an amount to be determined by the jury and such other relief as the Court deems proper. JURY TRIAL DEMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DEBORAH M. BORODATY and DORENE HAZELBAKER, ,	)	
Plaintiffs	)	
vs.	)	No. 97-0163
WEST PENN POWER COMPANY, INC.. a Pennsylvania Corporation,	)	
Defendant	)	JURY TRIAL DEMANDED

RULE 50 MOTION FOR JUDGMENT AS A MATTER OF LAW

AND NOW comes the Defendant, West Penn Power Company, Inc., by and through its attormys, Phillips & Faldowski, P.C.. and files the following Motion for Judgment as a Matter of Law, whereof the following is a statement:

1. This action aileges a violation of Title 7 of the Civil Rights Act as the result of an alleged hostile work envirorunent at the Plaintiffs' place of employment, the Mitchell Power Plant, owned and operated by the Defendant. West Penn Power Company.

2. Plaintiffs have alleged that this hostile work environmnent arose out of two incidents where the Plaintiffs suspect that they were viewed by co-cmployees while using locker and shower facilities at the plant.

3. The Defendant believes, however, that judgment. as a matter of law, must be granted on behalf of the Defendant and. in support thereof. state as follows:

(a) An initial element in a claim for sexual harassment. particularly where a.hostile work environment is alleged, is that there was a "intentional" act of discrimination against the individual plaintiff. Here, there has been no proof that either of the Plaintiffs were actually spied upon by any co-employees. While there has been circumstantial evidence that an opportunity for spying existed, and that one employee, Renee Armel, believed, on or about October 10. 1991. that she "felt" she was being watched, no co-employee has eveT been caught in the act of spying.

(b) Further, no co-employee has ever been caught in the act of spying upon either of the

Plaintiffs hure. Deborah Borodaty or Dorene Hazelbaker, w there is no evidence of an intentional act of discrimination against aie Plaintiffs so as to permit this case to go to a jury, requiring that judgment be granted in favor of the Defendant as a matter of law

(c) Should this Court determine that intentional acts of discrimination or evidence of the same are such that the issue must go to the jury, the Defendant is, nonetheless, entitled to a judgment as a matter of law as there has been no testimony that the intentional discrimination is alleged to be pervasive and regular. In fact, testimony has sbown thAt there are two separate and distinct incidents, one in October, 1991 and one in October, 1994, these two separate incidents hardly being able to be called pervasive or regular.

(d) Even if this Court were to determine that the Plaintiffs have presented evidence sufficient to submit the two described issues to the jury, a motion for judgment as a matter of law is, nonetheless.

required as the Plaintiffs' case in cKief bas sbown sufficient evidence, as a matter of law, that once management was informed of the suspicion of peering, it took prompt action and action which was reasonably expected to.be adequate to address the situation. Specifically, testimony has shown that on the date.the suspicions were made known to management, the access door in the air conditioning.room was welded shut. Further, testimony has shown that within eight to ten days the ceiling area of the women's locker room was pairited over with a textured paint so as to prevent any possibility of viewing from the ceiling area. With regard to the 1994 incident, testimony has shown that the women's locker room, prior to that time, had been isolated by a partition made of drywall in the ceiling area.

4. As such, the Defendant believes that it is entitled to a Motion for Judgment as a.Matter of Law in its favor.

5. Alternatively, should this Court determine the Defendant is not entitled to a Motion for Judgment as a

Matter of Law, the Defendant, nonetheless, believes this Court, as a matter of law, must find that the incident which occurmd in October. 1991 or any claims of sexual harassment as a result of that incident cannot be submitted to the jury as Plaintiffs' claims with regard to that incident are time-barred.

6. Under Title 7, the time limit for filing a charge of employment discrimination with the Equal Employment Opportunity Commission is 300 days from the date of the alleged discrimination. Plaintiffs are precluded from complaining about or presenting evidence regarding the events which preceded the 300 day limitation period, unless the Plaintiffs are able to demonstrate a "continuing violation."

7. To demonstrate a "continuing violation", however, the Plaintiffs must demonstrate that the act is part of an ongoing practice or pattern of discrimination and must show that the harassment is more than the occurrence of isolated or sporadic acts of intentional discrimination and, instead, demonstrate a continuing pattern of discrimination.

Sec Rush v. Scott Specialty Gases, Inc.113 F.3d 476 (3rd Ci.r. 1997).

8. Here, by the Plaintiffs' own admissions during their testimony, between the incident in October. 1991 and the incident in October, 1994, the Plaintiffs did not have any.complaints regarding other incidents of suspected "peering" or "peeping." Furthermore, Plaintiffs testified that between that period of time, other than complaining that the paint job to the ceiling tiles was "not a good job", the Plaintiffs had no complaints regarding sexual harassment or sexual discrimination.

9. The Plaintiffs have been unahle to show a continuing violation, and to the extent there has been testimony that between October, 1991 and October, 1994, that the Plaintiffs did not make complaints, but the main access area was welded, the ceiling tiles were painted over, a partition wall was put up in the ceiling, and the ceiling tiles were replaced, all in an effort to prevent the possibility of peering, the two incidents are isolated so that the 1991 action, as a matter of law, is tirne-barred. See, also.

Konstantopoulos v. Westvago Corp., 112 F.3d 710 (3rd Cir. 1997).

WHEREFORE. the Defendant, West Penn Power Company, requests this Honorable Court grant a Rule 50 Motion for Judgment as a Matter of Law with regard to the Plaintiffs' entire claim or, alternatively, grant a judgment, as a matter of law, that the Plaintiffs' claims for any alleged sexual harassment as a result of the October, 1991 incident are time-barred and that Plaintiffs' claims are limited to allegations of sexual harassment as a result of the October. 1994 incident alone.

Respectfully submitted,

PHILLIPS & FALDOSKI, P.C.
By: _____/s/_____
Damon J. Faldoski, Esquire
By: _____/s/
Kathleen Smith-Delach, Esquire

conducted?

A October 17th I believe that was a Thursday.

Q 1991?

A Yes, sir.

Q Now,were any notes kept of the responses of the employees?

A Yes, sir.

Q Now, did there come a time, on October 17th, 1991, where you conducted an interview of Mr. Edward Rodebaugh?

A Yes, sir.

Q And at that time did you ask him whether or not he was aware of the ladder to the duct area in the air conditioning room?

A Yes, sir.

Q What was his response to that question, if you know?

A As I recall it, he said he had been up there about six months previously. He had been sent up there by Mr. Walter Wietrzykowski to look for a leaking pipe, I believe.

Q Did he give you an indication as to what he observed when he was up there?

A Yes, sir. He said he crawled around, could not find the pipe, but did he see a -- did see some insulation rolled back and he could look into the ladies, locker room, shower room.

Q And he was referring to about six months prior to the date of the interview?

A Yes sir. He said about six months prior to that.

Q Did he indicate how he got to the place where the insulation had been pulled back?

A As I recall, sir, he said that he had crawled around, but didn't specifically say how he got over there.

Q Did he indicate that he had crawled along the duct work?

A Yes, he could have said that.

Q Yes?

A He could have said that, yes, sir.

Q If you were to refer to the notes of the interview, would that help refresh your recollection?

A My notes, yes, sir.

Q Would you do that?

A I didn't note it in my notes, sir.

Q Other than your notes, was there -- were there notes taken by the second investigator?

A Yes, sir. Mr. Callahan took notes.

Q Would a review of those notes help refresh your recollection?

A I could tell you what he has on his notes. I don't recall what he said.

Q Would you be kind enough to review those notes to determine whether it refreshes your recollection on that subject?

THE COURT: Do you understand what that means?

That means, read it to yourself and then see what you remember, not what's written there.

THE WITNESS: Yes, sir.

A No, sir, I don't recall specifically what you are asking.

Q All right. Was there any indication that Mr. Rodebaugh gave that he could see that there was light shining through where the insulation was pulled over?

A I recall him saying that he could look down into the women's shower room at that point.

Q And did he give you an indication as to how it was that he realized that he was looking down into the women's shower room at that point?

A I believe he said because he saw the shower mats on the floor, and I think he said that's when he realized it was the women's locker room.

Q Now, did he give you any indication as to whether he reported that the insulation was pulled back and that someone could be peeping to his supervisor?

A He told me he did not report that because he was looking for the leaking pipe and didn't give that much thought.

Q Did he give you an indication as to what it was -- did he give you an indication as to whether or not he realized that he could be a suspect?

A I believe, sir, he said that -- when Mr. Walt

Wietrzykowski said we were going to interview him that morning, he realized that he was up in the duct work and reminded Mr. Wietrzykowski that he had been up there on a legitimate purpose.

Q Did he indicate to you as to whether or not he was concerned that his fingerprints might be found up there?

A I don't recall him telling me that, sir.

Q Did he indicate to you that he feels that it was, more or less, a prank and that it's blown out of proportion?

A Yes, sir, he did say that.

Q Did he indicate to you that he doesn't think that it was

that bad, that it was done, but just that it was done in work?

A Yes, sir, he said that.

MR. FALDOWSKI: Just let the jury understand we are talking about this incident of October of 191.

MR. SUWAK: That's correct

MR. FALDOWSKI: When you referred to Ilit.11

MR. SUWAK: That would be my understanding.

BY MR. SUWAK:

Q Do you recall anything further about that discussion of Rodebaugh on that topic?

A Specifically, no, sir, other than it was seven years ago and I just have my notes to refresh my memory.

Q Does a review of your notes give you any indication?

A Yes, sir, I could see some light.

Q Now, did you observe any -- see any soda cans or pop cans, or anything of that nature, in the ceiling when you conducted your investigation?

A Yes, sir. There were two soda cans lying on top at the time, on top of the insulation at the time.

Q Did you secure those cans as evidence?

A No, sir, I did not.

Q There came a time when you had discussions, I believe, with Deborah Borodaty concerning these incidents?

A Yes, sir.

Q At any time, did you inform her that Mr. Rodebaugh had told you that he had been in the ceiling area approximately six months prior to October of 191, had observed the insulation pulled back and was able to see down into the ladies, locker area, particularly the mats, and had not reported that to his supervisor?

A No, sir. I did not tell her that.

Q Did you tell that to Dorene Hazelbaker?

A No,sir, I did not.

Q Did you tell that to Carol Levandoski?

A No,sir, I did not.

Q Did you tell that to Emily Rhoads?

A No, sir, I did not.

MR. SUWAK: That concludes my questions of the

take a recess

(End of sidebar discussion.)

(Court recessed at 3:55 p.m.)

(Court reconvened in the conference room at 4:25 p.m.)

THE COURT: The defendants have made their motion in writing and I will discuss the matters that they have raised here and what they haven't raised. In your summary judgment motion, just as in your motion now, you only talk about the peeking, and I am going to make some rulings on that. But, you don't address the other things of the hostile work environment, such as the alleged calendars and pictures, and so forth.

MRS. SMITH-DELACH: I understand that, Your Honor

THE COURT: That can amount to a hostile work environment, and it has nothing to do with the peeking and, I mean, there is evidence for the jury to consider on that.

But, let's start with, in their motion, the first thing they raise is, is there sufficient evidence that peeking took place, to start with? Because peeking certainly can amount to a hostile work environment if it did take place.

MR. SUWAK: May I make a brief remark on that?

THE COURT: Sure.

MR. SUWAK: Judge, our case in that regard, on whether or not there was inappropriate peering, would be premised on numerous factors.

Initially, the idea that the area directly over the shower was -- had the insulation pulled back would indicate someone had intentionally altered the ceiling area permitting the viewing.

THE COURT: But,there is no evidence of when that took place or who that was --

MR. SUWAK: The evidence would suggest --

THE COURT: -- or whether it was done for a legitimate purpose.

MR. SUWAK: we cannot imagine a legitimate purpose for that fact.

THE COURT: Well, you didn't produce any evidence to that effect though that there is no legitimate purpose for which you would have to put insulation back.

MR. SUWAK: Well, Judge, I don't know how I could show the absence of a legitimate purpose under the

circumstances. But, let me just -- I appreciate the Court's concerns.

THE COURT: Sure. Good.

MR. SUWAK: So, that's our first step.

Okay. The second step is, is that there is soda cans up there which are testified to by Mr. DeCree, suggesting that that is not a job-related function to be up there in the area. I am just going step by step.

THE COURT: As to that step, why wouldn't workmen, who go up there for legitimate reasons, get thirsty and drink soda, as well as people who might be up there for illegitimate?

You haven't shown -- first of all, you haven't shown any evidence that anyone was up there for an illegitimate purpose.

MR. SUWAK: Okay. The third item then, and this is where the whole thing comes to the fore, there is testimony that Mr. Rodebaugh was in the ceiling and peering through. Now--

THE COURT: Six months before.

MR. SUWAK: That's right. That's right.

THE COURT: That is the only evidence we have.

MR. SUWAK: But,that's indicative of -- I mean, honestly indicative clearly of a peering. Now --

THE COURT: No. There was no evidence that he viewed anybody in the shower or anybody in there at all, only that he could look down into the ladies' locker room.

MR. SUWAK: All right. Now, that's where, I believe, you have to take into account the testimony associated with his prior exposures. In other words, once we put this man up into the ceiling area, we have to consider whether or not it's for a legitimate purpose or not a legitimate purpose.

Now, we submit --

THE COURT: Well, the only evidence is that he was up there for a legitimate purpose.

MR. SUWAK: Well, but we submit that if you consider the circumstances associated with his uncontrolled impulses associated with exposure, that if you read that in combination with his present situation --

THE COURT: You are saying that there is some connection between exposing yourself to women and peeking on women?

MR. SUWAK: I am saying that there is an inability to control your impulse to gratification of this type.

THE COURT: You presented no scientific evidence that the two are connected. That might be your views that they are connected, but I don't think that there is any evidence that the jury could base a connection.

MR. SUWAK: Well, as I am going through my circumstances, I'm pointing that to an indication that I think would not require expert testimony in order to understand that a person's impulses are not normal.

Now, so the combination of the -- of course, the full testimony is not just the soda cans and cigarette butts which, by the way, under company policy, according to the testimony, there should not be any smoking up in that area because it would be based on Mr. Faldowski's inquiry, I believe, something of a --

THE COURT: So, only peekers would smoke up there?

MR. SUWAK: In other words, if the question is, if I am engaged in a legitimate job function, why can't I have a soda pop? Well, there is a reason why you wouldn't be smoking up in that area.

Now,the other thing is, is that that is an asbestos area. And according to the testimony of Mr. Dolence, he was undertaking the research work associated with these asbestos removals, and that in the absence of an emergency issue, there would not be people up there.

THE COURT: No, that wasn't his testimony. His testimony was there were legitimate reasons working on various pieces of equipment up there would be -- there were legitimate reasons why people would be up there.

MR. SUWAK: Well, this actually makes it all the more hard to understand, in that if we have an area where we expect people to be up there, and we have the evidence that the ceiling is wide open for a six-month period, despite the fact that there would be numerous people up there, whether you a.re up there for a legitimate --

THE COURT: No testimony there were numerous people up there. There was testimony that there were people up there for legitimate reasons.

MR. SUWAK: No one ever explained Mr. Druga coming down that ladder.

THE COURT: They don't have to explain it. You have the burden of proof. They don't have the burden of disproof.

MR SUWAK: When I asked Mr. Dolence of any legitimate reason for Mr. Druga - -

THE COURT: He didn't know.

MR. SUWAK: That's right.

THE COURT: He didn't know why he was up there.

MR. SUWAK: No. He didn't know that there was any legitimate reason.

THE COURT: He didn't know there was any illegitimate. He didn't know why he was up there.

MR. SUWAK: Am I not entitled, Judge, to the benefit of the inference at this stage when I look at all the circumstances?

THE COURT: Well, you claim you are. But, I'm saying that there is nothing from which an inference can reasonably be drawn.

So, in that respect, I'm ruling, as a matter of that the claim based upon the peeking is -- the motion is granted, as a matter of law, based upon the fact that there is insufficient evidence from which a reasonable jury could find that peeking took place at all, and so those incidents are out of the case.

Supreme Court, U.S.
FILED
MAR 27 2000
CLERK

(2)

No. 99-1425

In The

Supreme Court of the United States

DEBORAH M. BORODATY and
DORENE HAZELBAKER,

Petitioners,

v.

WEST PENN POWER COMPANY, INC.,
a Pennsylvania Corporation,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

The claim is one for sexual discrimination and harassment at a work place. The Petitioners, Deborah Borodaty and Dorene Hazelbaker, were employees at the Mitchell Power Station, a power generating plant of the West Penn Power Company, and allege that while employees the company permitted incidents of peeping to occur in the women's locker room area which, when coupled with an inadequate investigation of the alleged peeping, the prevalence of alleged pornographic materials at the plant and a prevalence of jokes, comments and other verbal harassment of the Petitioners, created a hostile work environment. The Petitioners presented testimony that they believed peeping occurred on at least two occasions. Initially, in October, 1991, they became suspicious that someone might be peering down at them in their locker room facility from a dropped ceiling after a female employee questioned another female employee if she had a "feeling of being watched." App.293a[1]. This female employee, who was "management", also explained that there was a door into the ceiling area, above the second floor, to include the area above the women's locker room, but admitted she did not hear any noises or see anything fall from the ceiling, but acted only on that "feeling." App.293a & 544a. As a result, one of the women employees, Carol Levandosky, crawled up a ladder in an air conditioning room off the hallway from the men's and women's locker room areas and, after shining

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[1] Page numbers followed by lower case letters designate pages of the Appendices filed in the Court of Appeals for the Third Circuit.

a flashlight into the ceiling area, proceeded to work her way over boards, walls, duct work and the like to get to that area of suspended ceiling above the women's locker room area. App.296a. The ceiling area above the second floor of the plant was filled with duct work but had no flooring, rather wires suspending those tiles which made up the ceiling, with a "couple" planks of lumber being suspended or positioned on the duct work which could be utilized to crawl in the ceiling area. App.297a. It was the contention of the Petitioners that an employee had accessed the ceiling area and then crawled through the ceiling from one of the access points, across this duct work, utilizing the planks, that employee then pulling back insulation over the shower stalls, the restroom area, and a bench in the locker room where the female employees changed their clothes, so that he or she could peer down through the perforated ceiling tile and watch the women. App.298-299a.

The Petitioners presented testimony, in support of their belief that peering had occurred, that when an inspection was made of the ceiling area one of the female employees found "rags", candy wrappers and cans. App.299a. Petitioners persisted in their belief that a peering had occurred, despite the fact that the first female employee to access the ceiling area found the venture so precarious and so delicate that she could not access the ceiling area above the women's locker room without putting her foot through the ceiling tile. They also persisted in their belief, despite the fact that the Petitioners acknowledged that no on had ever been caught in the act of spying, they never heard rumors of anyone spying or peering down on them before their suspicions were

aroused in 1991 or afterwards, and no one saw anyone gaining access into the ceiling area for any purpose other than a legitimate business reason. App.135a, 249a-253a, 327a, 437a, 518a, 528a. Testimony at trial elicited the fact that the ceiling area was required to be accessed to perform various jobs at the plant, to include asbestos inspection and abatement, control and maintenance of the vents and ducts for heating and cooling, and the installation of speakers so as to accommodate a plant address system. App.436a, 522a-527a, 573a and 620a.

Despite the fact there was no direct evidence of any peering, the same day the women employees voiced their suspicions to management, an investigation was undertaken by West Penn. During the course of that investigation access to the ceiling area was cut off by welding the access panel; employees were interviewed to determine whether or not they had been in the ceiling area and, if so, for what purpose and if they had any knowledge or heard any rumors of peering; an investigator crawled into the area to examine where the peeping was alleged to have taken place and to determine possible area of access, and the perforated ceiling tiles were painted over so as to prohibit the ability of anyone to visualize the ladies through the tiles. App.613a-618a, 620a-621a, 273a-274a, 358a-363a. While it could not be proved or confirmed that peering had taken place, the employer, subsequent to the immediate investigation, replaced the ceiling with solid, rather than perforated, tiles and had a drywall partition – wooden or plywood walls being prohibited in a power plant – erected in the ceiling area so as to completely segregate and wall off the ceiling area above the women's locker room.

While the Petitioners provided testimony to suggest that a possible peeper was overlooked through this investigation, the female employees for the first time suggested there may have been harassment by a certain employee, Ed Rodebaugh, who may have exposed himself to female employees, the employees, when asked to give statements against Mr. Rodebaugh, whom the Petitioners identified in their Complaint as the "peeper", refused to cooperate with the investigation, refused to give statements, and refused to sign statements that Mr. Rodebaugh engaged in harassing behavior against them.

While the Petitioners further attempted to present testimony to suggest that a second incident of alleged "peeping" had occurred in October, 1994, when "lint" was found on a toilet, the Petitioners again presented no direct evidence that any peeping had, in fact, occurred. The only evidence to support Petitioners' suggestion that another incident of peeping had occurred in October, 1994 was dirt found on a toilet. App.244a. Again, there was no testimony that anyone was found or caught peeping or that anyone was found to have been in the ceiling area for any reason unrelated to his or her employment that anyone even had the "feeling" again of someone looking down. When the female employee notified West Penn management in 1994 that there was dirt on the toilet, the management investigated the area above the ceiling to see if there was a way it could be accessed. Finding, to the management's satisfaction, that there was no way to access the ceiling area, management had the female employees examine the area themselves, at which time the Petitioners noted not only that the ceiling tiles had been changed, but that a drywall partition had been

installed to completely segregate the restroom/locker room from other ceiling areas of the plant. The Petitioners, at that time, voiced no dissatisfaction with the investigation in 1994 or the explanation regarding why there was lint on the toilet (work being done on the blower system). App.438a-422a.

In sum, the Petitioners attempted at trial to make out claims of a hostile work environment by suggesting, first and foremost, that they had been the subject of unauthorized peering. Thereafter, they claimed that once this peering had been brought to management's attention, the employer inadequately investigated the same and/or failed to take steps to prevent "peeping" in the future, and permitted the Petitioners to become the subject of jokes, teasing and other humiliating comments by male employees. Petitioners further suggested that pornographic materials were prevalent in the plant and that the peering incident, as well as the alleged inadequate investigation, the pornographic materials and the jokes, teasing and humiliating comments all created a hostile work environment which led to depression, anxiety, problems at home and modification of the Petitioners' work habits to avoid the restroom.

After the close of the Petitioners' case, the Defendant presented a Rule 50 Motion to dismiss the Petitioners' action, in total, to the extent the Defendant believed the Petitioners had not presented a prima facie case of sexual harassment and discrimination through a hostile work environment. While not granting the Motion in total, the trial court did agree that the Petitioners had failed to present sufficient evidence as to any allegations of

unauthorized viewing. To that end, the trial was set to move forward on the Petitioners' other claims for harassment and a hostile work environment. Upon hearing the judge's ruling, the Petitioners decided to withdraw all of their other claims, suggesting the heart and soul of their case was the peeping.

It is important to recall, however, that the Judge's grant of the Rule 50 Motion dealt with the alleged peering itself and did not touch upon the allegations of "inadequate investigation", the pornographic materials, the jokes or other indicia of the alleged hostile environment. The trial court did not grant a Rule 50 as to the Petitioners' entire case, but only to their suggestion that intentional discrimination had taken place as a result of the female plaintiff employees being peered at in the shower facilities through ceiling tiles. The trial court, unlike suggested by the Petitioners, did not rule on the claim for hostile environment based upon claims of lack of promotion, an old boy network, harassing statements and jokes or pornographic materials; nor did the Judge's Order even suggest, as Petitioners claim, that they were prohibited from proceeding with their claim of a hostile work environment based on some alleged ineffective investigation of the Petitioners' suspicions. The only thing that was precluded, via the grant of the Rule 50 Motion, was a claim for sexual discrimination based upon the alleged "unauthorized viewing." See Appendix 1A. To that end, the only issue valid before the Third Circuit was whether there was enough evidence presented to the trial court to make out a claim for an unauthorized viewing, the Respondent believing, to the extent there was no direct evidence of any peering nor any evidence of any

unauthorized or unnecessary access to the ceiling area, that the trial court properly granted Rule 50 Motion that the Third Circuit properly dismissed Petitioners' appeal and that this Petition For Grant Of Certiorari is, likewise, without merit.

REASONS FOR DENYING THE WRIT

A. Writ of Certiorari must not be granted as there are no special or important reasons which would require review by this Court, the matters on appeal being solely evidentiary.

A review of a Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons therefor. It would appear that the Petitioners are suggesting that the reasons upon which Certiorari should be granted here are twofold. First, while Petitioners realize that they are essentially asking that an evidentiary question be reviewed and therefore, certiorari will not normally be granted, litigants suggest the Third Circuit deprived them of their right to a jury determination, and on this basis important reasons exist to grant Certiorari. Secondly, they claim review is necessary as the Third Circuit overlooked a portion of the basis for appeal, namely ineffective investigation. A review of the record in this matter, however, suggests both bases are without merit.

This is a case wherein the Petitioners allege sexual discrimination at the work place. First, they claim there was an unauthorized peering of them while in the shower facilities. Second, they allege that their employer did not

properly investigate their complaints and created a hostile environment by that failure. Further, they permitted male employees to have pornographic materials in the plant and to engage in demeaning behavior including the proliferation of sexual specific statements and jokes throughout the facility. It is important to recall that the trial court, when granting the Rule 50 Motion, granted it only as to the Petitioners' claim as to the alleged unauthorized peering. The trial court was prepared to permit Petitioners' claim of sexual harassment to go forward on the second basis, that of the claimed failure to investigate, jokes, materials and the hostile work environment created thereby, *but the Petitioners chose not to proceed on that basis.* The only evidentiary ruling made by the trial court dealt with the alleged peering. It was the finding of the trial court, and rightly so, that the claims of peering were based on nothing more than speculation, so that for the trial court to permit a jury to decide if, in fact, a peering had taken place, would be to permit the jury to do nothing more than guess. To that end, there is nothing which would suggest any special or important reason for the grant of certiorari. Rather, the trial court in its ruling simply prohibited a claim to proceed to the jury which, in the trial court's opinion, was based solely on supposition and would have required the jury to engage in speculation in order to support Petitioners' claims. In short, a matter of evidence must be left to trial courts.

As was noted by the trial court and the Third Circuit, the Petitioners' claims that there had been unauthorized peering at them through the ceiling persisted despite the

fact that no employee, male or female, had ever been caught peering at the women employees.

Petitioners seem to suggest, however, that as the Rule 50 Motion was granted and that portion of their claim was taken from the jury, that this basis, in and of itself, coupled with the fact that the claim was for sexual harassment and, therefore, a federally based claim is sufficient to warrant the grant of certiorari. There is nothing, however, about the Petitioners' claim which places it beyond and above the ordinary and require this Court to accept the Petition. While Petitioners may certainly feel that they have had, and will have, no outlet for their alleged complaints, nothing could be further from the truth. In fact, although their claim for the alleged "peering" under a harassment theory may have been disposed of by the trial court, Petitioners have a pending State Court claim which addresses the same issues and which would provide an outlet for compensation if, in fact, warranted.

While Petitioners point to the totality of the circumstances to argue the grant of certiorari is necessary, it was the Petitioners themselves who chose not to proceed upon the claims of harassment due to the investigation of the event, pornographic materials, alleged failure to promote, and harassing jokes. Petitioners, rightly or wrongly, believed that their claim as to the alleged peering was the standard bearer of their case, for the Petitioners now to suggest that the totality of the circumstances requires review by this Court, is nothing more than a backhanded attempt by the Petitioners to pick up the pieces of what they have left behind. It was Petitioners' own desire not to proceed to a jury on their sexual harassment claim

based upon the claimed hostile environment which prohibited the jury from considering these issues. Petitioners are, therefore, disingenuous in making any argument to this Court that certiorari must be granted because of the totality of those circumstances.

Further, it is equally disingenuous for the Petitioners to assert that certiorari must be granted here because of any claimed lack of investigation or any claimed failure on the part of the employer to address Petitioners' claims. Again, first and foremost, Petitioners chose not to proceed on that basis to the jury and cannot now rewrite that history. Furthermore, even if this Court were to accept that the trial court granted the Rule 50 Motion not only as to the peering but to the investigation, evidence in the lower court had shown that when the Petitioners first addressed their belief that a peering might be occurring to management, management took immediate steps not only to have the claims investigated but to insure appropriate remedial measures – assuming the peering took place – by immediately welding the access panel to the ceiling area and painting the ceiling tiles so as to make it impossible for any unauthorized viewing through the small perforations in the ceiling tiles. The ceiling area was later segregated all together through the construction of a drywall partition and the ceiling tiles were replaced.

Of the claimed second incident of peering some three years later, when the Petitioners notified their employer of their concerns, the company had management employees look to determine the integrity of the drywall partition and the ceiling tiles, encouraging and requesting the Petitioners themselves view the area above the ceiling tile and voice any continuing concerns after that

examination. In sum, an investigation was undertaken and corrective measures addressed with the purpose of preventing any further peering, assuming it had even occurred.

While the Petitioners suggest, under the Third Circuit case of *Knabe v. Boury Corp.*, 114 F.3d 407 (3d Cir. 1997), that certiorari must be granted as no investigation was undertaken, not only is the evidence to the contrary, but the Third Circuit in *Knabe* makes it clear that it is not whether the investigation is adequate or that the employer's action, to include any remedial action, is adequate, but whether it is seen to reasonably address the claimed harassment. Here, evidence had shown that the employer had undertaken remedial action which could reasonably be termed adequate, questions of the adequacy of this evidence again not dealing with so important or unusual an issue as to require grant of certiorari in this case.

The question of the adequacy of the remedial action begs the question that the alleged peering had occurred and must lead one back to the question of whether or not there was adequate evidence of the alleged peering. This is an unusual case as, almost as a matter of course, the plaintiff is able to make out the first element of a sexual harassment claim, intentional discrimination because of his or her sex, through his/her own direct testimony. A plaintiff is able to testify that he/she was subject to some harassment during his/her employment, pointing to specific acts or comments by specific employees, whether they be co-employees or management. While the accused co-employee or manager might deny that the acts ever

occurred and the question becomes one of credibility for the jury, the plaintiff, to make out a prima facie case, need only provide his/her testimony that the act occurred. Here, the basic problem with the alleged peering or peeping is that neither of the Petitioners, and, in fact, none of the Petitioners' witnesses, could testify that the peering or peeping took place. They could, at best, only testify as to their "speculation" that peering or peeping had taken place as a result of their belief that there was access to an area in the ceiling of the shower/restroom which provided an opportunity for such peeping. Simply put, there was no direct evidence of any intentional discrimination as a result of any peeping, so the Petitioners, in their case in chief, were simply unable to make out – that with regard to the allegations of peeping alone – intentional discrimination had taken place. As such, one must further question if any alleged failure to "adequately" or "properly" investigate an event which cannot be proved to have occurred can be the basis for any sexual harassment or hostile work environment claim. None of the cases cited by the Petitioners address this issue, all of those cases involving the typical situation where prima facie evidence of a discriminatory event was proved by direct testimony. This query aside, testimony showed an investigation was conducted to address the Petitioners' concerns, and the simple fact that Petitioners ultimately became unhappy with its results, because no one was caught in the act or confessed and was disciplined, does not render this case one for review by this Court.

The finding of the lower court – that the evidence submitted by the Petitioners of the claimed peering was simply not adequate to permit the issue to go to the jury

on anything other than a speculative basis – was well founded. The Petitioners' claim of opportunity and motive do not an act of intentional discrimination create. Petitioners' outrage that they may have been looked upon while in the locker facility simply is not adequate evidence that the alleged peering actually took place, and this lack of evidence, particularly when coupled with the Petitioners' own decision not to proceed to the jury, is simply not a proper basis for this Court to accept certiorari.

CONCLUSION

Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

PHILLIPS & FALDOWSKI, P.C.
WILLIAM D. PHILLIPS, ESQUIRE
Attorneys for Respondent
West Penn Power Company, Inc.

APPENDIX

APPENDIX

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Judgment entered in lower court case at page 27 of Appellants' Brief 1A

United States District Court

Western DISTRICT OF Pennsylvania

DEBORAH M. BORODATY
and
DORENE HAZELBAKER

v.

WEST PENN POWER
COMPANY, INC.,
a Pennsylvania
Corporation

JUDGMENT IN A CIVIL CASE

CASE NUMBER:
C.A. 97-163

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment as a matter of law entered in favor of Defendant West Penn Power Company, Inc. and against Plaintiffs Deborah M. Borodaty and Dorene Hazelbaker as to Plaintiffs' allegations of unauthorized viewing.

Plaintiffs Deborah M. Borodaty and Dorene Hazelbaker withdraw all remaining claims against Defendant West Penn Power Company, Inc.

Approved:

/s/ Alan N. Bloch
United States District Judge

/s/ James A. Drach
Clerk

DEC 8 1998
Date

/s/ Illegible
(By) Deputy Clerk